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IN THE

Supreme Court of the United States

October Term, 1958.

No. 179.

THE PENNSYLVANIA RAILROAD COMPANY,
Appellant,

v.

BOROUGH OF SAYREVILLE, ET AL.,
Appellees.

On Appeal From the Supreme Court of New Jersey.

APPELLANT'S BRIEF IN OPPOSITION TO MOTION TO AFFIRM.

WINDSOR F. COUSINS,
1138 Transportation Center,
Six Penn Center Plaza,
Philadelphia 4, Pa.

HUGH B. COX,
Union Trust Building,
Washington 5, D. C.,
Attorneys for Appellant.

September 4, 1958.

International, 711 So. 50th St., Phila. 43, Pa.

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1. The constitutional question presented in this appeal was squarely raised below by appellant and decided by the New Jersey Supreme Court. *Sayreville v. Pennsylvania R. R. Co.*, 26 N. J. 197, 139 A. (2d) 97. Jurisdictional Statement, Exhibit A, pp. 1a-2a. Thus this Court has jurisdiction. *Charleston Assn. v. Alderson,* 324 U. S. 182, 185-6; *Wilson v. Cook,* 327 U. S. 474, 480.

It is unnecessary to inquire, as appellees suggest, whether the question was raised at an earlier stage in the litigation. As this Court said in *Charleston Assn. v. Alderson, supra*, pp. 185-6:

> "Where it appears from the opinion of the state court of last resort that a state statute was drawn in question, as repugnant to the Constitution, and that the decision of the court was in favor of its validity, we have jurisdiction on appeal. For we need not inquire how and when the question of the validity of the statute was raised when such question appears to have been actually considered and decided by that court."

Nevertheless, the question was also decided by the New Jersey Superior Court, Appellate Division. *Sayreville v. Pennsylvania R. R. Co.*, 44 N. J. Super. 17? 129 A. (2d) 895. See Jurisdictional Statement, Exhibit B, p. 30a. Although commenting that the constitutional question was subsidiary to the issue of statutory construction and that "a foundation for the presentation of the subsidiary point is scarcely raised in defendant's brief", the Court stated that "the question was orally argued and we will deal with it." Jurisdictional Statement, Exhibit B, pp. 26a-27a.

The constitutional question was necessarily subsidiary because the Public Utility Commission declined to construe the statute asserted by the appellant to be applicable, and denied without opinion appellant's petition for clarification of its order. Jurisdictional Statement, Exhibit D, p. 38a. The Superior Court construed the statute adverse to appellant's contention and held that, so construed, the New Jersey law was not repugnant to the Constitution.

Appellant did not shift its position in the New Jersey courts, and the New Jersey Supreme Court did not state that appellant had shifted its position, as alleged in the Motion to Affirm, p. 4. Appellant's position in both courts below was the same as now presented in this Court, to wit, that a statute which imposes the cost of crossing improvements on a railroad as a fixed rule, precluding any determination of what is fair and reasonable, is arbitrary and unconstitutional. Both opinions below discussed the cases cited by appellant in support of this position, *Nashville, C. & St. L. Ry. v. Walters*, 294 U. S. 405; *Atchison R. Co. v. Public Utility Commission*, 346 U. S. 346.

2. Although the Motion to Affirm contains unsubstantiated factual statements, e.g., that the bridge was built originally by the Railroad for its own convenience and that it had become unsafe, the Public Utility Commission made no such findings and this appeal presents no factual controversy. Appellant has accepted the findings of the Com-

mission and does not ask the Court to go back of the Commission's decision and to review the evidence. Likewise, appellees are not free to make a better case for the imposition of costs on the Railroad than that contained in the Commission's order. The Commission's finding and order requiring a new bridge were based solely on matters affecting the convenience of highway travel, and having no relation to safety from railroad operation. For example, the Commission held that a wider bridge would counteract the difficulties caused by curved approaches for which the railroads have no responsibility. Jurisdictional Statement, p. 36a. It is against these findings that the statute must be viewed to determine its validity.

3. Appellant does not deny that a State can constitutionally place the entire cost of a crossing improvement on a railroad, but it contends that this cannot be done arbitrarily and with no opportunity for the consideration of the reasonableness of such a requirement. In the *Atchison* case, upon which appellees rely, and in which a cost allocation by the California Commission was upheld, this Court said that "such allocation of costs must be fair and reasonable". The New Jersey statute, as now construed, permits no determination by the State Commission of cost allocation but automatically places the entire cost on the railroad, regardless of circumstances. If the Commission finds that the improvement is necessary, it has no alternative but to charge the full cost to the railroad. Appellant submits that a substantial question of due process is presented by this situation.

4. Appellees' suggestion that a fair and reasonable apportionment under differing circumstances has been made by the Legislature, in virtue of several statutes applicable to various types of highways, is specious, as the statute involved in this appeal fits into no pattern of regulation. The statute applied is a law enacted in 1903, which would still govern all crossing improvements in New Jersey, if

it had not been almost entirely superseded by the more recent laws cited by appellees. Although in numerous situations the railroad has been wholly or substantially relieved from the cost of crossing improvements, the New Jersey Supreme Court held, contrary to appellant's contention, that the old statute has been left untouched with respect to one class of crossing improvements, i.e., the reconstruction of crossings which are subject to Commission jurisdiction. The paradoxical effect of this ruling is that while a railroad no longer has the major burden for eliminating a crossing which may endanger highway travel, it has full responsibility when the danger has been removed for reconstructing the crossing to meet changing highway conditions.

The fixed and arbitrary rule embodied in the statute may have been fair in 1903 when the railroad was the primary source of danger, but it permits no consideration of the revolutionary changes in highway transportation that have since occurred. Appellant submits that it does not meet constitutional requirements on its face or as applied to the facts in this case.

For the reasons stated in the Jurisdictional Statement, the question presented by this appeal is substantial, and it is respectfully submitted that probable jurisdiction should be noted.

WINDSOR F. COUSINS,
1138 Transportation Center,
Six Penn Center Plaza,
Philadelphia 4, Pa.
HUGH B. COX,
Union Trust Building,
Washington 5, D. C.,
Attorneys for Appellant.

September 4, 1958.

CERTIFICATE OF SERVICE.

I, Windsor F. Cousins, counsel for appellant, hereby certify that on September 3, 1958, I served a copy of the foregoing Brief on appellees, by depositing the same in the United States Post Office, with first class postage prepaid, addressed to counsel of record, David D. Furman, Attorney General, State House Annex, Trenton, New Jersey, Howard T. Rosen, Deputy Attorney General, 1100 Raymond Boulevard, Newark 2, New Jersey, Joseph T. Karcher, 61 Main Street, Sayreville, New Jersey, John E. Mullane, 116 N. Broadway, South Amboy, New Jersey, and Samuel V. Convery, 175 Smith Street, Perth Amboy, New Jersey.

WINDSOR F. COUSINS.